

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HENRY UNSELD WASHINGTON,

CIVIL DIVISION

Plaintiff,

3:19-CV-00196

vs.

KANSKY DELISMA, et al

Defendants.

**MOTION TO DISMISS PURSUANT TO Fed. R. Civ. PROC. 12(b)(6)<sup>1</sup>**

AND NOW, comes Defendant, Richard Irwin, by and through his counsel, David M. Chmiel, Esquire and Matis Baum O'Connor, P.C., and brings the following Motion to Dismiss, and in support thereof, states as follows:

1. Plaintiff commenced the within lawsuit on or about November 12, 2019.
2. Plaintiff's Complaint was docketed on November 14, 2019. (Doc. 5).
3. Following a Motion to Dismiss filed on behalf of Co-Defendants and Brief in Support (Docs. 32, 33), Plaintiff filed an Amended Complaint. (Doc. 43).
4. This Honorable Court entered an Order dismissing Defendants' Motion to Dismiss as moot and directing all Defendants to answer or otherwise respond to the Amended Complaint. (Doc. 44).

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<sup>1</sup> In the alternative, Dr. Irwin requests this Court consider and/or treat this as a Motion for Summary Judgment under Rule 56. Fed. R. Civ. Proc. 12(b)(6)(d)

5. Plaintiff's Amended Complaint consists of thirteen (13) handwritten pages and appears incomplete. However, in reviewing the original Complaint filed by Plaintiff at Doc. 5, Plaintiff's claims against Dr. Irwin arise out of care and treatment rendered to and/or recommended for the incarcerated, pro se Plaintiff.

6. More specifically, Plaintiff contends in Paragraph 72 of the Plaintiff's original Complaint that Dr. Irwin recommended laser surgery of the right eye, but Dr. Hyde did not make necessary arrangements; Plaintiff contends in Paragraphs 151 and 152 that, on or about February 19, 2019, Dr. Irwin was deliberately indifferent to Plaintiff's eyesight and *was angry that Plaintiff had sued him*, reportedly saying, "you can go blind in both eyes for what I care." Plaintiff contends that Dr. Irwin refused to refer him to an ophthalmologist for laser eye surgery; in Paragraph 174 of Plaintiff's original Complaint, together with Paragraphs 196 and 197, Plaintiff contends that Dr. Irwin violated the Equal Protection Clause of the Constitution on or about September 27, 2017, October 18, 2017, and February 19, 2019 by intentionally discriminating against him because of his race to penalize him for communicating with authorities; Plaintiff contends in Paragraph 213 of his original Complaint that Dr. Irwin and others violated Plaintiff's right to free speech by threatening him with violence and denying him medical care and equal protection, together with Paragraph 262, which maintains that Dr. Irwin retaliated against Plaintiff for continuously communicating with authorities, including complaining regarding Dr. Irwin and filing grievances against him; finally, Plaintiff contends in Paragraph 276 that Dr. Irwin showed deliberate indifference to Plaintiff wearing dark glasses while his right eye was discharging pus and blood. Dr. Irwin allegedly appeared angry with Plaintiff and declared that he had an awful lot to tell authorities. Plaintiff contends that Dr. Irwin was penalizing him for filing grievances and suing him.

7. The allegations included in Plaintiff's Amended Complaint include deliberate indifference and cruel and unusual punishment. (Doc. 43, ¶ 98, et seq.). In the original Complaint, Plaintiff also included allegations of violation of Plaintiff's constitutional rights

under the Equal Protection Clause, (Doc. 5, ¶ 171 et seq.) and violation of Plaintiff's constitutional rights to free speech (Doc. 5, ¶ 212 et seq.).

8. As acknowledged in Plaintiff's Complaint and Amended Complaint, Dr. Irwin is already subject to another lawsuit filed against him by Plaintiff at No. 3:17-cv-00070. A true and correct copy of the Amended Complaint from that lawsuit is attached hereto and marked as **Exhibit A**.

9. As indicated in the prior lawsuit, Plaintiff's claims against Dr. Irwin are virtually identical and include allegations that: "more than once Defendant, R. Irwin, recommended Plaintiff for laser surgery on Plaintiff[s] right eye. Defendant, B.P. Hyde, did not make necessary arrangements for laser surgery to be done, or canceled it." (**Exhibit A**, ¶ 80). Allegations against Dr. Irwin in the prior lawsuit include: Count I: Deliberate Indifference and Cruel and Unusual Punishment (**Exhibit A**, ¶ 113 et seq), Count II: Equal Protection (**Exhibit A**, ¶ 222 et seq), and Count III: Freedom of Speech (**Exhibit A**, ¶ 280, et seq).

10. In the prior lawsuit, Dr. Irwin filed a Motion to Dismiss, and this Honorable Court issued a Report and Recommendation which specifically recommended that the Motion be granted with respect to Plaintiff's claim for First Amendment exercise of freedom of religion and denied as to all other claims. A true and correct copy of the Report and Recommendation is attached hereto and marked as **Exhibit B**. The Report and Recommendation was adopted as the opinion of the Honorable Kim R. Gibson on or about May 12, 2020. Kindly refer to **Exhibit C** attached.

11. Dr. Irwin filed an Answer and Affirmative Defenses in the other lawsuit on June 4, 2020.

12. As indicated, the Plaintiff's claims against Dr. Irwin are virtually identical with the prior lawsuit filed. A District Court "has the inherent power to dismiss an action when it is duplicative of another action pending in the Federal Court." *Abdel-Bachir v. U.S. Attorney*

*General*, 2017 WL 8219530 (S.D. Ohio, Western Division 2017), adopted at 2018 WL 1256366 (S.D. Ohio, Western Division 2018).

13. For the foregoing reasons, it is abundantly clear that Plaintiff's allegations in the within lawsuit are duplicative of the prior suit filed against Dr. Irwin. As such, Dr. Irwin respectfully requests this Honorable Court grant the Motion to Dismiss.

WHEREFORE, Defendant Richard Irwin, respectfully requests this Honorable Court grant the within Motion to Dismiss.

MATIS BAUM O'CONNOR

By: /s/ David M. Chmiel  
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PA I.D. 076464  
Attorney for Richard Irwin, Defendant

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**CERTIFICATE OF COMPLIANCE**

I, the undersigned, hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

MATIS BAUM O'CONNOR

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am this day serving a true and correct copy of the foregoing **MOTION TO DISMISS PURSUANT TO Fed. R. Civ. PROC. 12(B)(6)** upon the persons listed below by United States, First-class mail, postage prepaid, this 17th day of June, 2020.

Henry Unseld Washington  
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